IN THE

...reme Court of the United States

No. 71- 71-692

...PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

...TED STATES ex rel. DONALD SOMERVILLE,

Respondent.

...PETITION FOR WRIT OF CERTIORARI TO ...E UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner The People of the State of Illinois, respondent-Appellee in the Court below, prays that a writ of *certiorari* issue to review the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals, Seventh Circuit, is reported at —— F. 2d ——, (7th Cir. 1971) (No. 17817), and is attached hereto as Appeendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, were entered on July 20, 1971, with one judge dissenting. The State's petition for rehearing by the court *en banc* was denied on September 3, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether a mistrial which is declared after selection of a jury and before the taking of any evidence, based on an indictment which is insufficient to charge an offense under state law, and which thus deprives the court of the power to exercise jurisdiction over the controversy, thereby constitutes a bar to any retrial on the basis of the double jeopardy provision of the Fifth Amendment as made applicable to State prosecutions by the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The petitioner, Donald Somerville, and one Marjorie Kullerstand were indicted in March 1964. The indictment charged that they committed the offense of theft on March 24, 1963, "in that they knowingly obtained unauthorized control over stolen property, to wit: thirteen hundred dollars in United States Currency, the property of Zayre of Bridgeview, Inc., a corporation, knowing the same to have been stolen by another in violation of Chapter 38, Section 16-1(d) of the Illinois Revised Statutes of 1963."

On November 2, 1965, a jury was selected and sworn and without further action the cause was continued to the following day. Before any evidence was taken and before opening statements were delivered by counsel, the prosecutor moved the court to withdraw a juror and declare a mistrial, stating as his reason therefore that the indictment was void in that it failed to aver the necessary intent. Defense counsel replied to the motion: "Your honor, both defendants object to this at this time." The court allowed the prosecution's motion, withdrew a juror and declared a mistrial.

The next day a new indictment was returned. The petitioner then filed a motion to dismiss the indictment pursuant to the Illinois statute prohibiting prosecutions when there has been a former prosecution for the same offense. The motion was denied. A jury was selected and sworn and a verdict of guilty was returned. The petitioner was sentenced to the Illinois State Penitentiary for a period of from two to ten years.

REASONS FOR GRANTING THE WRIT

This case was decided by the United States Court of Appeals for the Seventh Circuit after it was remanded by this Court for reconsideration in light of *United States* v. *Jorn*, 400 U.S. 470, and *Downum* v. *United States*, 372 U.S. 734 (1963). Earlier, the court of appeals had affirmed a district court ruling dismissing a petition for a writ of habeas corpus. In that instance the court was divided two to one. After the case was remanded by this Court, one judge reversed his position, and, consequently, the court of appeals has now decided to reverse the district court with one judge dissenting.

In reversing itself, the court failed to apply the test prescribed by this Court in *United States* v. *Jorn*, 400 U.S. at 481; it did not determine whether there was a "manifest necessity" for declaring a mistrial for the preservation of the objectives of "public justice." Rather, the court, contrary to *Jorn*, ruled against the State because, in its opinion, the prosecution was "responsible" for "an allegedly defective indictment" which led the trial court to declare a mistrial (A. 11). The court of appeals did not consider the question of whether there were valid reasons for not going forward with the trial at the time that the mistrial was declared. It was of the mistaken opinion that it could not consider problems of state judicial procedure in deciding whether or not there was justification for aborting the trial. It thought immaterial our contention that the trial court, when it declared a mistrial, was following the dictates of constitutionally valid state law in that it was without judicial authority to act in the cause except to declare its own incapacity. The court of appeals refused to consider that argument on the basis that federal, and not state, law

was controlling.* While correctly recognizing the rule, the court erred in the manner in which it applied it in this case. As a result, the court has created needless conflict between the right of a state to limit the exercise of judicial power by its courts and the obligation of all courts, federal and state, to uphold the constitutionally declared right of a person not to be twice placed in jeopardy.

The court of appeals, while refusing to even consider the circumstance of existing state criminal procedures, has placed the viability of those procedures in question by its decision. Illinois is one of those states where an indictment by a grand jury is required by state constitution. In interpreting that provision of our constitution, the Illinois Supreme Court has held that a state court has no authority to act in a felony criminal case where there is not a sufficient indictment (which is substantively unalterable by anyone but the grand jury). Any act by a

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*In doing so the court cited United States v. Ball, 163 U.S. 662, and Benton v. Maryland, 395 U.S. 784 (A. 13). However, Justice Castle, in writing for the court in its earlier opinion, pointed out the distinction: "The 'acquittal' appears to have been the operative factor dictating the result in Ball, not the mere circumstance that a jury had been impaneled and sworn;" and, ". . . it was the 'acquittal' which was relied upon in Benton v. Maryland . . ." United States ex rel. Sommerville v. Illinois, 429 F. 2d 1335, 1337 (7th Cir. 1970).

The state's position here is not that the court's lack of jurisdiction meant that the defendant was not in jeopardy, but that the court's lack of jurisdiction created a "manifest necessity" to call a halt to the proceedings. Neither Ball nor Benton involved the issue of "manifest necessity."

court in a criminal case of felony magnitude absent a valid indictment is extrajudicial. This state has developed a substantial body of law consistently holding that a defendant never loses the right to challenge the authority of a court to act in a given case no matter when he raises the issue. A defendant cannot be foreclosed from avoiding a judgment of conviction entered by a court which was not properly empowered to act.*

As a result of this aspect of Illinois law, the trial court in this case, once it became aware of the insufficiency of the indictment, as a matter of Illinois law was required to declare a mistrial. That decision was preordained, and it was not within the discretion of the court to refuse to recognize that it had no authority to preside over the case. In a matter of state concern, a state court cannot proceed where it is not authorized to do so. The trial court had to declare a mistrial even were it to mean that the defendant could not thereafter be prosecuted. The failure to adhere to the jurisdictional requirement of a valid indictment because of the specter of a subsequent double jeopardy defense would in itself have been a denial of the Equal Protection Clause of the Fourteenth Amendment.

The court of appeals overlooked the fact that otherwise appropriate state criminal procedures are not ren-

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*People v. Edge, 406 Ill. 490, 493, 94 N.E. 2d 359, 361 (1950); People v. Harris, 394 Ill. 325, 68 N.E. 2d 728, 729-30 (1946); People v. Fore, 384 Ill. 455, 51 N.E. 2d 548 (1943). See also, People v. Sommerville, 88 Ill. App. 2d 212, 232 N.E. 2d 155 (1967), leave to appeal denied, 37 Ill. 2d 627 (1968), cert. denied, 393 U.S. 823; People v. Greene, 92 Ill. App. 2d 201, 235 N.E. 2d 195 (1968); People v. Billingsley, 67 Ill. App. 2d 292, 213 N.E. 2d 765 (1966).

dered invalid simply because they have an incidental impact on the resolution of federally declared rights. Transfixed by a desire to uphold the defendant's Fifth Amendment right, the court of appeals foreswore any need to balance that consideration against Illinois' interest in the administration of its jurisprudence. The court of appeal's decision makes meaningless that portion of the rule announced in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824) and reasserted in *Jorn*, 400 U.S. at 481, which requires that the trial court consider the public's interests as well as the defendant's in exercising its discretion as whether or not to declare a mistrial. As a result of the decision, an important element of Illinois jurisprudence has been undermined if not obliterated.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SEPTEMBER TERM, 1970, APRIL SESSION, 1971

No. 17817

UNITED STATES OF AMERICA ex rel. DONALD SOMERVILLE,

Petitioner-Appellant,

v.

STATE OF ILLINOIS,

Respondent-Appellee.

On Remand from the Supreme Court of the United States.

JULY 20, 1971

Before MAJOR and CASTLE, *Senior Circuit Judges*, and FAIRCHILD, *Circuit Judge*.

MAJOR, *Senior Circuit Judge*. This case had it genesis by way of a petition for habeas corpus filed in the district court by Donald Somerville, which asserted that he was being held in custody unlawfully pursuant to a sentence imposed in a trial which subjected him to double jeopardy, in violation of the Fifth Amendment. It was alleged that Somerville had been placed in jeopardy by reason of a previous state court charge which was dismissed on motion of the government ,after a jury had been impaneled and sworn to try the case. The district court dismissed the petition for failure to state a claim upon which relief could be granted. From such dismissal Somerville appealed to this court.

The principal issue involved the interpretation and effect to be given *Downum* v. *United States*, 372 U.S.

734. This court, with one judge dissenting, in an opinion rendered May 14, 1970, held that *Downum* was not applicable and affirmed the district court's order of dismissal. *U.S. ex rel. Somerville* v. *State of Illinois*, 429 F. 2d 1335.

On January 25, 1971, the Supreme Court decided *United States* v. *Jorn*, 400 U.S. 470. On Somerville's petition for writ of certiorari, that court on April 5, 1971 entered an order which in material part provided:

> "The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of *United States* v. *Jorn*, 400 U.S. 470, decided January 25, 1971; and *Downum* v. *United States*, 372 U.S. 734 (1963)."

After receipt of the mandate, we requested counsel for the respective parties to submit briefs in support of their contentions relative to *Downum* and *Jorn*. This has been done, and this court, with one judge dissenting, now holds that those decisions require that the order of the district court be reversed and Somerville discharged.

We think it not necessary to reiterate the factual situation or the reasoning employed in our previous majority and dissenting opinions. One factor, however, which appears to have been strongly relied upon by the majority is that Somerville was not in jeopardy because he was not tried and acquitted. *United States* v. *Ball*, 163 U.S. 662, and *Benton* v. *Maryland*, 395 U.S. 784, are cited in support of this reasoning. The fact that jeopardy attached in those cases at the time the defendants were tried and acquitted furnishes no support for the premise that jeopardy in the instant case did not attach at the time the jury was impaneled and sworn to try the case.

Any doubt on this score has been removed by the Supreme Court.

In *Green* v. *United States*, 355 U.S. 184, 188, the court stated:

> "Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."

In *Jorn*, the court recognized this principle (page 480):

> "Thus the conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings."

We doubt the necessity, much less the pertinency, of attempting to discuss *Jorn* in detail. Generally, the cases dealing with double jeopardy fall into two categories, (1) where a mistrial is declared without any affirmative action on the part of the defendant, or (2) where a mistrial is declared on defendant's motion or a conviction reversed on his appeal. *Downum*, *Jorn* and the instant case fall squarely in the first category. In *Downum*, it was the failure of the government to secure the attendance of a material witness; in the instant case, it was an allegedly defective indictment for which the government was responsible, and in *Jorn*, it was the trial judge who aborted the proceeding, without defendant's consent. In *Jorn*, the court (page 474) stated:

> "The issue is whether appellee had been 'put in jeopardy' by virtue of the impaneling of the jury in

the first proceeding before the declaration of mistrial."

After citing and discussing numerous cases where the plea of double jeopardy had been denied, all on facts we think quite dissimilar to those here, the court stated (page 484):

> "For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. *On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'* See *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)." (Italics supplied.)

The Supreme Court in *Jorn* apparently recognized the validity of *Downum*. It stated (page 486):

> "The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee. Cf. *Downum* v. *United States*, 372 U.S. 734 (1963)."

Mr. Chief Justice Burger in a concurring opinion made the pertinent statement (page 488):

> "If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take appellee's claims outside the classic mold of being twice placed in jeopardy for the same offense."

That statement would have been as appropriate to the facts in *Downum* as it is to those of the instant case.

The State of Illinois in its brief, supposedly written as an aid to our interpretation of *Jorn*, contends that Illinois, not federal, law is controlling on the issue as to when jeopardy attaches. We see no purpose in pursuing this line of reasoning. Under the mandate of the Supreme Court the case has been remanded for reconsideration in the light of *Jorn* and *Downum*, and not Illinois law. In our previous opinion we held that Somerville's claim of double jeopardy must be tested by the application of federal standards (page 1336). Moreover, the issue has been settled adversely to the State by *United States* v. *Ball*, 163 U.S. 662, and *Benton* v. *Maryland*, 395 U.S. 784.

We hold that in the light of *Downum* and *Jorn*, the petition for habeas corpus should have been allowed and Somerville discharged. The order appealed from is reversed and the cause remanded for that purpose.

CASTLE, *Senior Circuit Judge*, dissents for the reasons set forth in *United States of America ex rel. Donald Somerville* v. *State of Illinois*, 429 F. 2d 1335.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Friday, September 3, 1971.

Before

Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. J. EARL MAJOR, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

UNITED STATES OF AMERICA, ex rel. DONALD SOMERVILLE,
Petitioner-Appellant,
vs.
No. 17817
STATE OF ILLINOIS,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a re-hearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-692

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

UNITED STATES ex rel. DONALD SOMERVILLE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent's statement of reasons for granting the writ suggests the Seventh Circuit Court of Appeals ignored the mandate of this Court remanding this case for further consideration in light of *United States* v. *Jorn*, 400 U.S. 470 (1970) and *Downum* v. *United States*, 372 U.S. 734 (1963). More specifically, respondent contends that the lower court ignored the mandate of *Jorn* in failing to apply the prescribed test of whether there was a "mani-

fest necessity" for declaring a mistrial and argues that the lower court rested its ruling solely upon the fact that the prosecution was responsible for the defective indictment (Respondent's petition, p. 4).

This contention of petitioner ignores the fact that this case was remanded for consideration in light of *both Jorn* and *Downum*, and that, as recognized by Judge Major in his previous dissenting opinion, the facts of this case are as similar to those in *Downum* ". . . as two peas in the same pod." *United States ex rel. Somerville* v. *State of Illinois*, 429 F.2d 1335, 1338 (7th Cir. 1970). Although petitioner seeks merely to rely upon *Jorn* and to ignore the equally significant decision of this Court in *Downum*, a reading of both cases, separately or together, compels the conclusion that this case falls outside the ". . . number of limited situations in which retrial is permissible" as defined by this Court in applying the *Perez* doctrine of "manifest necessity." (*Note, Double Jeopardy—Declaration of Mistrial Without Consent of Defendant*, 32 La. L. Rev. 147, 148) Petitioner's argument merely begs the question of whether there was a "manifest necessity" by asserting in conclusory fashion that a manifest necessity for declaration of a mistrial existed. An analysis of the facts of *Jorn*, *Downum* and the instant case compels the opposite conclusion.

1. Rather than supporting the contention of petitioner that the decision of the lower court represents a misapplication of *Jorn*, the facts of the instant case compare most favorably to those of *Jorn*, where the mistrial did not result from any neglect or action by the government and where, as here, there was a lack of consent by the defendant to the mistrial. In *Jorn*, the government urged on brief presumably in an effort to distinguish *Jorn* from *Downum*,

as follows: "In sum, the mistrial was not due to any lack of proper preparation by the prosecution." (Brief for the United States, p. 19) The facts here are directly contrary, for the mistrial in the instant case is and was attributable solely to the lack of proper preparation by the prosecution exhibited by the procuring of the defective indictment.

In addition, in *Jorn* the Court emphasized the lack of consent of defendant to a mistrial, strenuously opposed by defendant in the instant case.

One commentator has observed that in *Jorn* this Court announced "a . . . new policy involving greater scrutiny of a trial judge's declaration of mistrial without the consent of the defendant." (*Note, supra*, at 150) The effect of *Jorn* is thus ". . . to limit substantially the discretion a trial judge has to declare a mistrial without the consent of the defendant." (*Note, supra*, at 150)

Thus, in placing excessive reliance upon *Jorn* and in ignoring *Downum*, petitioner fails to recognize the factual distinction between *Jorn* and *Downum*, in each of which, however, this Court found the *lack* of any "manifest necessity" for declaration of a mistrial and found that a second trial violated petitioner's right not to be placed twice in jeopardy for the same offense and deprived him of his right to be tried by the jury already selected and sworn. In *Jorn* the mistrial resulted from the actions of the trial court alone. In *Downum* the mistrial resulted from and was caused by the actions of the prosecution. Accordingly, the extent that the lower court's decision was predicated upon the actions of the prosecution in procuring a defective indictment and proceeding to trial upon the same, the lower court, relying upon *Downum* and the cases cited therein, directly followed the order of the Court remanding this case for further consideration in light of *Jorn* and *Downum*.

Lending further support to the decision of the lower court, this Court in *Jorn* expressly recognized the ". . . lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee." (*United States* v. *Jorn*, 400 U.S. 470, 486) (citing *Downum*)

2. Contrary to the contention of petitioner that the "manifest necessity" doctrine was not considered by the lower court, the Court of Appeals did in fact recognize and apply the "manifest necessity" rule of *Jorn*, which is cited and quoted from throughout the opinion, but concluded (correctly, we urge) that no "manifest necessity" exists for declaration of a mistrial where the mistrial is caused by the return of a defective indictment by the prosecution and where defendant does not consent to a mistrial. Recognizing the importance of the lack of any action by defendant in causing the mistrial in *Jorn*, Chief Justice Burger observed, in words most applicable here, that this case fits the "classic mold of being twice placed in jeopardy for the same offense." *Jorn* v. *United States*, 400 U.S. at 488 (concurring opinion). This observation of the Chief Justice was quoted by the lower court. (447 F.2d at 735)

Respondent seems to ignore the fact that the "manifest necessity" doctrine was not created by this Court in *Jorn*, but rather has always been the touchstone for determining whether declaration of a mistrial followed by retrial for the same offense places a defendant twice in jeopardy. From *United States* v. *Perez*, 22 U.S. 9 (Wheat.) 579 (1824) through *United States* v. *Ball*, 163 U.S. 662 (1896), *Wade* v. *Hunter*, 336 U.S. 684 (1949), *Green* v. *United States*, 355 U.S. 184, *Gori* v. *United States*, 367 U.S. 364 (1961), *Downum* v. *United States*, 372 U.S. 734 (1969),

and finally *Jorn*, that Court has always adhered to the "manifest necessity" test.

In citing and relying upon many of these cases and particularly the leading case of *Downum* v. *United States*, the lower court squarely faced the issue and decided that where the prosecution procures a defective indictment and proceeds to trial thereon, there exists no "manifest necessity" for declaration of a mistrial. Accordingly, petitioner cannot urge that the lower court failed to consider and apply the "manifest necessity" test for declaration of a mistrial.

3. Petitioner further contends that the writ should be granted because the lower court refused to consider ". . . the circumstance of existing state criminal procedures," namely that in certain States, including Illinois, a State Court has no authority to act upon a defective indictment. This contention ignores the fact that following this Court's decision in *Benton* v. *Maryland*, 395 U.S. 784 (1970), the question of whether a defendant has been twice placed in jeopardy is a matter to be determined by *federal law* and under federal law a defective indictment renders a conviction not void but merely *voidable*, as recognized in *United States* v. *Ball*, 163 U.S. 662, 669-70 (1896). Directing itself to this issue, the lower court plainly rejected petitioner's contention that respondent's claim of double jeopardy must be tested by Illinois law and held that the issue of whether a defendant is placed in jeopardy by a defective indictment ". . . has been settled adversely to the State by United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300, and Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 707." (447 F.2d 733, 735).

Petitioner's contention that the judgment of the lower court is erroneous because existing State procedures

rendered the trial court powerless to try respondent and required a mistrial under Illinois law (Petition, p. 6) simply begs the essential issue—namely, whether under *federal law* there was a "manifest necessity" for declaration of a mistrial, for, it must not be forgotten, if the trial court was required to declare a mistrial, the trial court was placed in such a position by the actions of the prosecution, not the defendant, and therefore under *Downum* there was no "manifest necessity" to declare a mistrial, notwithstanding any requirement of State law.

4. Finally, in urging that the trial court ". . . had no authority to preside over the case" (Petition, p. 6) petitioner's approach is somewhat quixotic and ignores the practical aspects of the administration of criminal justice with a view toward fairness to defendants as well as to the public. Following the argument of petitioner to its logical conclusion—namely, that the trial court was powerless to act and thus the proceedings were a "nullity"—it would appear that numerous persons have served and are serving a sentence which is a "nullity," a position which is clearly untenable. As observed by this Court in *Ball*, "Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits." (*United States* v. *Ball*, 163 U.S. 662, 668). These proceedings are perhaps a "nullity" to all concerned except the prisoner whose incarceration is a very real fact indeed. To adopt the position urged by petitioner would exacerbate such a Kafkaesque situation in which persons placed on trial on defective indictments could be retired, perhaps *ad infinitum*, without even knowing whether their trial or sentence was a "nullity" and was to be repeated at some future time.

CONCLUSION

For the reasons urged herein, respondent respectfully prays that the writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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February 1972